

**SEMINOLE COUNTY GOVERNMENT
AGENDA MEMORANDUM**

SUBJECT: Mediated settlement of a federal action under the Telecommunications Act challenging the Board of County Commissioners actions denying the special exception of TBCom Properties, LLC. for a cellular tower

DEPARTMENT: County Attorney's Office

DIVISION: Litigation

AUTHORIZED BY: Lola Pfeil

CONTACT: Matthew Minter

EXT: 5736

MOTION/RECOMMENDATION:

[Continued From 11/18/2008] 1. Approve the Mediated Settlement and the Development Order for the communications tower located on Parcel 202 of the Carillon PUD and authorize the Chairman to execute the aforementioned documents (TBCOM PROPERTIES, LLC, applicant); or

2. Deny the Mediated Settlement and Development Order for the communications tower located on Parcel 202 of the Carillon PUD (TBCOM PROPERTIES, LLC, applicant);

County-wide

Matthew Minter

BACKGROUND:

On December 11, 2007, the Board of County Commissioners appealed the decision of the Board of Adjustment to approve a communication tower pursuant to Seminole County Land Development Code Section 1.12(b).

The request was to construct a 130 feet communication tower with a flagpole design. The applicant proposed to co-locate five (5) carriers on the tower. The subject property is located in the Carillon PUD. The site is Parcel 202 which permits C-1 (Retail Commercial) district uses. The property is currently vacant.

The Board of County Commissioners held a public hearing on this item on February 12, 2008. At that public hearing, the Board denied the communications tower on a 3-2 vote.

Following the public hearing, TBCOM PROPERTIES, LLC, (hereafter, "TBCOM") filed a civil lawsuit in the United States District Court for the Middle District, styled TBCOM PROPERTIES, LLC, A FLORIDA LIMITED LIABILITY COMPANY, v. SEMINOLE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, Case No. 6:08-cv-379-ORL-28-DAB to challenge the County's denial of the communications tower. This action is filed under the Federal Telecommunications Act of 1996 ("TCA"). This action is somewhat similar to a state-court action by way of petition for writ of certiorari to review local government land use decisions, in that the proceeding is a non-jury proceeding and the court reviews the transcript

and the evidence submitted to the Board of County Commissioners to determine whether the BCC's action comports both with the TCA and with state land use law. The TCA is a federal attempt to protect communication tower companies against arbitrary decisions based on nothing more than opposition to cell towers on a not-in-my-backyard ("NIMBY") basis, while at the same time balancing the Court's authority in this area against the proper and legitimate exercise of discretion by the local land use authority. The suit has two allegations: (1) that a written order of denial, specifying the basis for the decision, was not rendered within thirty days from the date of the public hearing; and (2) that the BCC order of denial that was rendered is not supported by substantial evidence. The current status of the proceedings is that TBCOM has filed its motion for summary judgment. The Court ordered the parties to mediate the dispute, which mediation occurred before Court-Appointed mediator Stephen Bechtel on October 15, 2008. The parties participated in good faith at the mediation, and the mediation concluded with a Mediated Settlement, subject to BCC ratification. Among other points, the settlement calls for scheduling consideration by the BCC on November 18, 2008. As a result thereof, the County staff has advertised a public hearing for that date, so that any affected party may be heard regarding the settlement proposal. The terms of the settlement include additional conditions, agreed to by TBCOM, which call for, among other things, an eight-foot masonry wall, to be consistent with the existing walls in the Carillon area, at the base of the facility. There will be a five foot landscape buffer, including a hedge and eight canopy trees outside of the wall. These and other specifics are included in a new proposed development order that would permit the 130' high communications tower, subject to the new and previously stated conditions. The new conditions will cause TBCOM to incur significant expense, and will significantly improve the ground level aesthetics of the tower site.

Currently, the Court has dismissed the suit, but without prejudice, pending BCC action on the settlement. That basically means that the suit can be easily re-filed if the BCC does not approve the settlement. If the BCC does not ratify this settlement, then the County will file its response to TBCOM's motion for summary judgment, which may include our own cross-motion. The Court will then rule on the opposing motions. If the Court rules against the County, it may order the County to approve the tower, but without the new conditions specified in this settlement. Note that this case is similar to a case also involving TBCOM with a communications tower in the vicinity of I-95, involving the City of New Smyrna Beach. After the Court ruled against the City on the issue of liability in that case, the parties settled a few days before trial was to commence.

This proposed settlement would further the County policy that favors collocation, and achieves a greater benefit for area residents, as compared to TBCOM's original proposal which had been approved by the Board of Adjustment. With respect to the interests of area residents, they are not currently a party to the litigation. If the BCC approves this settlement, and any of them wish to challenge the resulting approval, they would be advised to contact private counsel to consider intervening in the federal court action.

STAFF RECOMMENDATION:

Staff recommends that the Board of County Commissioners approve the Mediated Settlement and the Development Order for the communications tower located on Parcel 202 of the Carillon PUD and authorize the Chairman to execute the aforementioned documents.

ATTACHMENTS:

1. TB Com Development Order

Additionally Reviewed By:

☒ County Attorney Review (Matthew Minter)

SEMINOLE COUNTY APPROVAL DEVELOPMENT ORDER

On November 18, 2008 Seminole County issued this Development Order relating to and touching and concerning the following described property:

LOT 2 CARILLON PARCEL 202 PB 53 PGS 27 & 28

(The aforescribed legal description has been provided to Seminole County by the owner of the aforescribed property.)

FINDINGS OF FACT

Property Owner: AHG Group
1551 Sandpur Road
Maitland, FL 32751

Project Name: McCulloch Road (1680)

Special Exception Approval:

Special exception for a 130 foot communication tower in the PUD (Planned Unit Development)

The Development Approval sought is consistent with the Seminole County Comprehensive Plan and will be developed consistent with and in compliance to applicable land development regulations and all other applicable regulations and ordinances.

The owner of the property has expressly agreed to be bound by and subject to the development conditions and commitments stated below and has covenanted and agreed to have such conditions and commitments run with, follow and perpetually burden the aforescribed property.

Prepared by: Dori DeBord,
Planning and Development Director
1101 East First Street
Sanford, Florida 32771

Order

NOW, THEREFORE, IT IS ORDERED AND AGREED THAT:

- (1) The aforementioned application for development approval is **GRANTED**.
- (2) All development shall fully comply with all of the codes and ordinances in effect in Seminole County at the time of issuance of permits including all impact fee ordinances.
- (3) The conditions upon this development approval and the commitments made as to this development approval, all of which have been accepted by and agreed to by the owner of the property are as follows:
 - a. The height of the tower shall not exceed 130 feet.
 - b. A eight (8) foot masonry wall shall be constructed around the base of the tower. This wall shall be located along the eastern, western and southern boundaries of the site. A chain link gate will be permitted to allow access to the equipment located at the base of the tower. The wall will be built to the specifications found in Exhibit 1 and Exhibit 2 attached to this Development Order.
 - c. A five (5) foot landscaped buffer will be installed and maintained by the developer outside the perimeter of the wall on the south and west sides. This buffer will include eight canopy trees per 100 linear feet, be at least 8 feet tall with a 2 inch caliper at breast height. A shrub or hedge will be planted between the canopy trees, at least three feet off-center and 10 feet apart.
 - d. The developer will provide maintenance and irrigation to the landscaped buffer around the entire base of the tower.
 - e. IM study will be conducted by each subscriber and a test will be conducted prior to commercial use. The IM analysis shall address potential impacts on public safety communications facilities in the immediate area of proposed tower as well as the impact of collocation on the tower itself. If the IM study indicates significant potential for interference, the collocation shall not be permitted. If there are any unresolved problems after the commencement of service, TBCOM will immediately remove the offending subscriber from service.
 - f. The flagpole will be lighted and a serviceable 20' x 30' American flag will be flown at all times.
 - g. Copies of the IM studies including any analysis and findings will be made available to the County's Telecommunications Manager for review and comment. The IM engineering, analysis and the County's

Telecommunications Manager's review and comment shall be completed within 60 days.

(4) This Development Order touches and concerns the aforescribed property and the conditions, commitments and provisions of this Development Order shall perpetually burden, run with and follow the said property and be a servitude upon and binding upon said property unless released in whole or part by action of Seminole County by virtue of a document of equal dignity herewith. The owner of the said property has expressly covenanted and agreed to this provision and all other terms and provisions of this Development Order.

(5) The terms and provisions of this Order are not severable and in the event any portion of this Order shall be found to be invalid or illegal then the entire order shall be null and void.

Done and Ordered on the date first written above.

Chairman, Seminole County
Board of County Commissioners

STATE OF FLORIDA)
COUNTY OF SEMINOLE)

I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared _____ who is personally known to me or who has produced _____ as identification and who executed the foregoing instrument.

WITNESS my hand and official seal in the County and State last aforesaid this _____ day of _____, 2008.

Notary Public, in and for the County and State
Aforementioned

My Commission Expires:

Exhibit 1



Existing

TBCOM Properties
TB172/UCF
Compound View
Facing East
From Parking lot



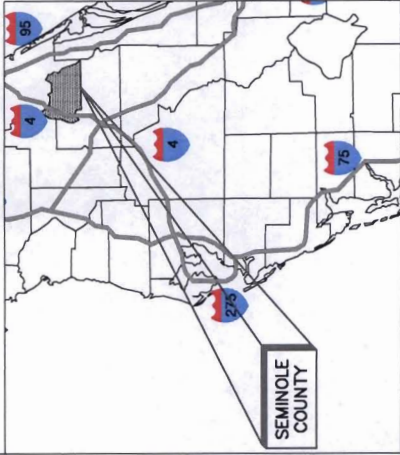
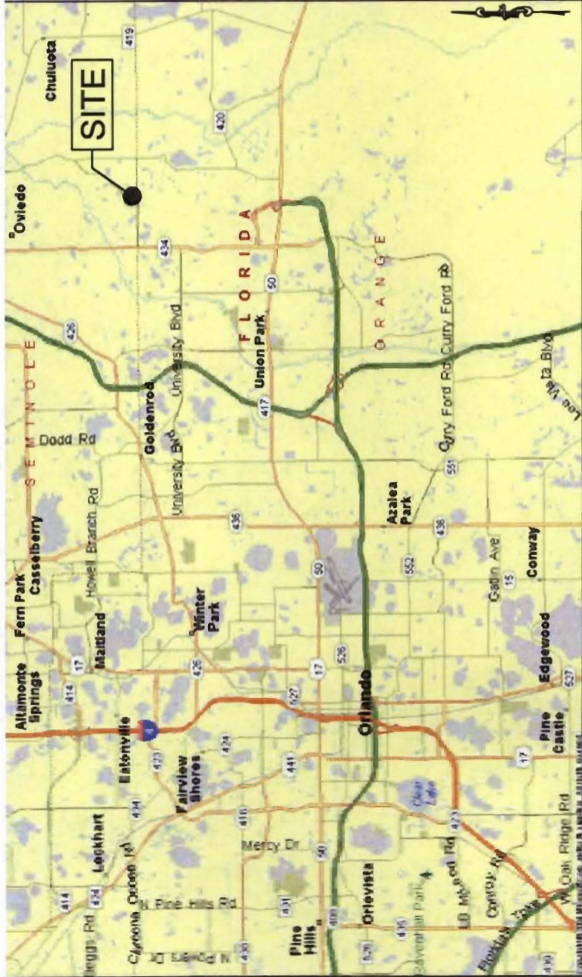
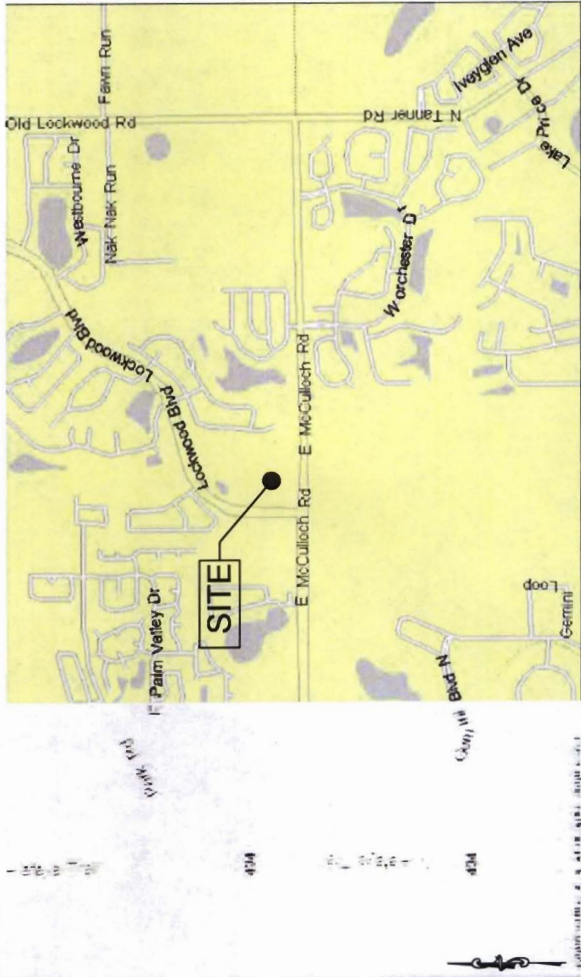
TBCOM Properties
TB172/UCF
Compound View
Facing North From McCulloch Road

PARCEL NO.: 35-21-31-31-512-0000-0020

TBCOM PROPERTIES, LLC

TB172/ UCF

SITE ADDRESS
1680 MCCULLOCH ROAD
OVIEDO, FLORIDA 32765



FROM I-4:
~ SR-417 TO UNIVERSITY BLVD (EAST)
~ ON UNIVERSITY BLVD (EAST) TAKE A LEFT ON SR-434
~ SR-434 (NORTH) TAKE A RIGHT ON E MCCULLOCH RD
~ ON E MCCULLOCH RD TAKE A LEFT ON LOCKWOOD BLVD
~ SITE IS ON RIGHT HAND SIDE

DRIVING DIRECTIONS



*** CAUTION ***
THE UTILITIES SHOWN HEREON ARE FOR THE CONTRACTOR'S CONVENIENCE ONLY. THERE MAY BE OTHER UTILITIES NOT SHOWN ON THESE PLANS. THE ENGINEER HAS CONDUCTED VISUAL SURVEYS OF THE PROJECT AREA AND HAS NOTED THE CONTRACTOR'S RESPONSIBILITY TO VERIFY ALL UTILITIES WITHIN THE LIMITS OF THE WORK. ALL DAMAGE MADE TO EXISTING UTILITIES WITHIN THE LIMITS OF THE WORK SHALL BE THE SOLE RESPONSIBILITY OF THE CONTRACTOR.

FOR EMERGENCIES CALL: 911

POWER
PROGRESS ENERGY
TEL: (800) 700-8744
TELEPHONE
BELL SOUTH
TEL: (800) 753-2909

UTILITIES

PROPERTY OWNER (PARENT PARCEL):
AHG GROUP LLC
PARCEL NO.: 35-21-31-512-0000-0020
ZONING: PUD

CONTACTS

SITE DATA:
LATITUDE :28° 36' 46.76" NORTH (NAD83)
LONGITUDE: 81° 11' 25.79" WEST (NAD83)
GROUND ELEVATION= 48.0 FT (NGVD 29)
PROPOSED TOWER = 130' FLAGPOLE TOWER
FLOODPLAIN DESIGNATION: COMMUNITY PANEL NO. 120289 0230 E OF THE
FLOOD INSURANCE RATE MAPS FOR SEMINOLE COUNTY, FLORIDA, DATED
04/17/95 THE SUBJECT PROPERTY IS IN FIRM ZONE "X", I.E. AREAS
DETERMINED TO BE OUTSIDE THE 500 YEAR FLOODPLAIN

DESIGN DATA:
DESIGN CODE : FLORIDA BLDG. CODE-2004 (WITH 2005/2006 SUPPLEMENTS) & TIA/EIA, 222-G
BASIC WIND SPEED :110 MPH (3 SECOND GUST)
EXPOSURE CATEGORY :B
INTERNAL PRESSURE COEF. :N/A
COMPONENT & CLADDING :N/A
WIND PRESSURES :N/A

PROJECT DATA



foresite
group

Foresite Group, Inc.
231 N. Kentucky Ave.
Suite 2
Lakeland, Florida 33801
o | 863.603.4044
f | 863.603.4645
www.foresitegroupinc.com
FL CA 26115

SEAL:

DRAFT
FOR REVIEW

PROJECT: TB172
UCF

LOCATED AT:
1680 MCCULLOCH RD
OVIEDO, FLORIDA 32765

DEVELOPER/TOWER OWNER:
TBCom Properties, LLC.
1133 LOUISIANA AVE. SUITE 114
WINTER PARK, FLORIDA 32789
(407) 622-1377 (o)
CONTACT: MR. TIM O'SHAUGHNESSY

REVISIONS DATE

ISSUED FOR: ZONING

PROJECT MANAGER: RCS

DRAWING BY: RCS

JURISDICTION:SEMINOLE COUNTY, FLORIDA

DATE: 10/24/08

TITLE:

COVER SHEET

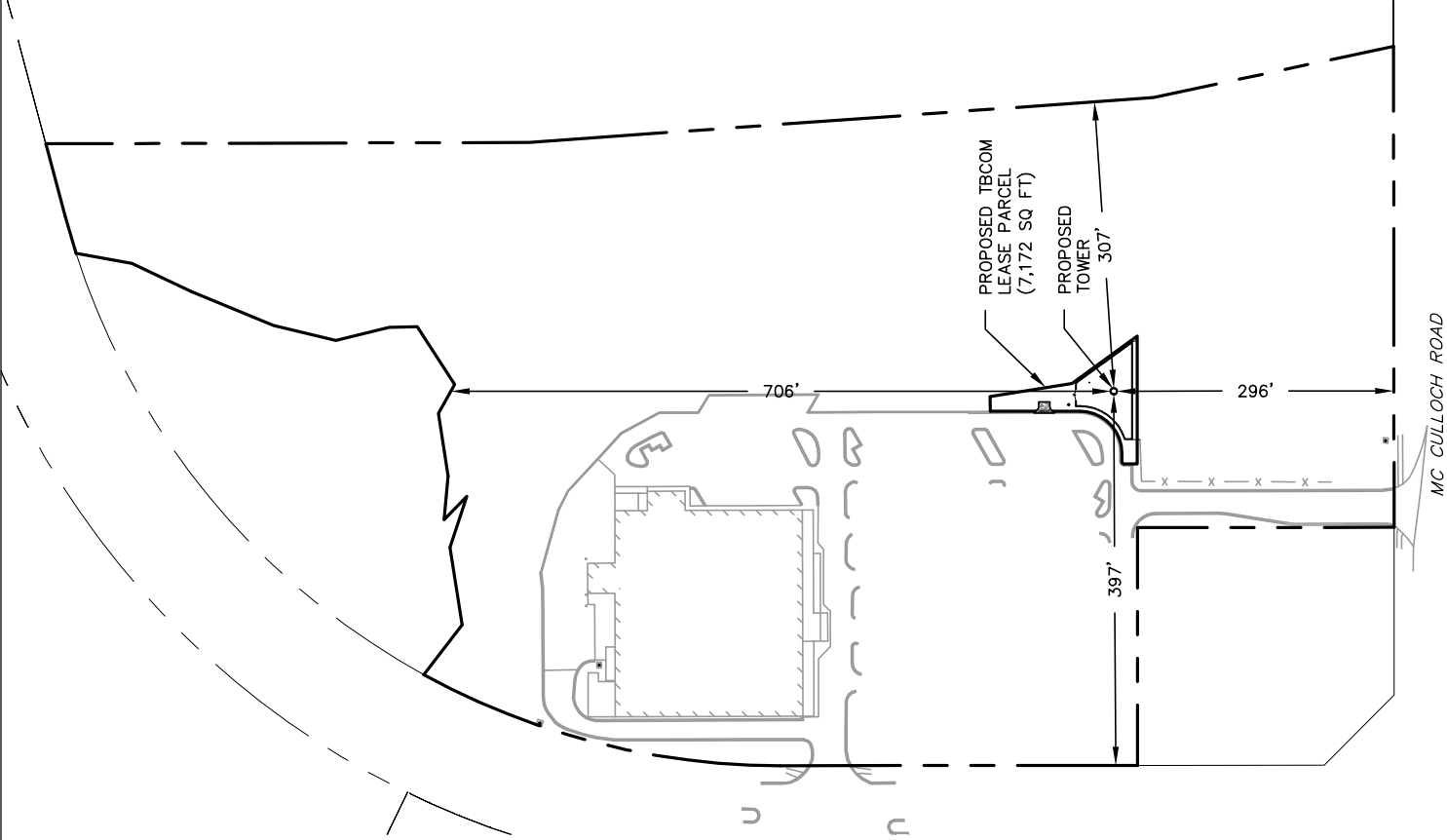
SHEET NUMBER: T-1

JOB/FILE NUMBER: 067.019

TBCOM IS PROPOSING TO CONSTRUCT A 130' FLAGPOLE TOWER AND COMMUNICATIONS FACILITY.		
PROJECT SUMMARY		
SHEET	DESCRIPTION	REV.
T-1	COVER SHEET	0
Z-1	OVERALL SITE PLAN & TOWER SETBACKS	0
Z-2	SITE PLAN & TOWER ELEVATION	0
Z-3	LANDSCAPE PLAN & CONSTRUCTION DETAILS	0
SHEET INDEX		



OVERALL SITE PLAN

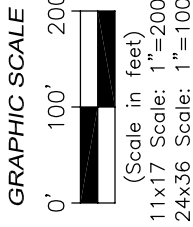


TOWER SETBACKS

SETBACKS SUMMARY

TOWER SETBACKS *	
REAR (NORTH)	706'
FRONT (SOUTH)	296'
SIDE (WEST)	397'
SIDE (EAST)	307'

* MEASURED FROM PROPERTY LINE TO BASE OF TOWER



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RCS

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RCS

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& TOWER SETBACKS

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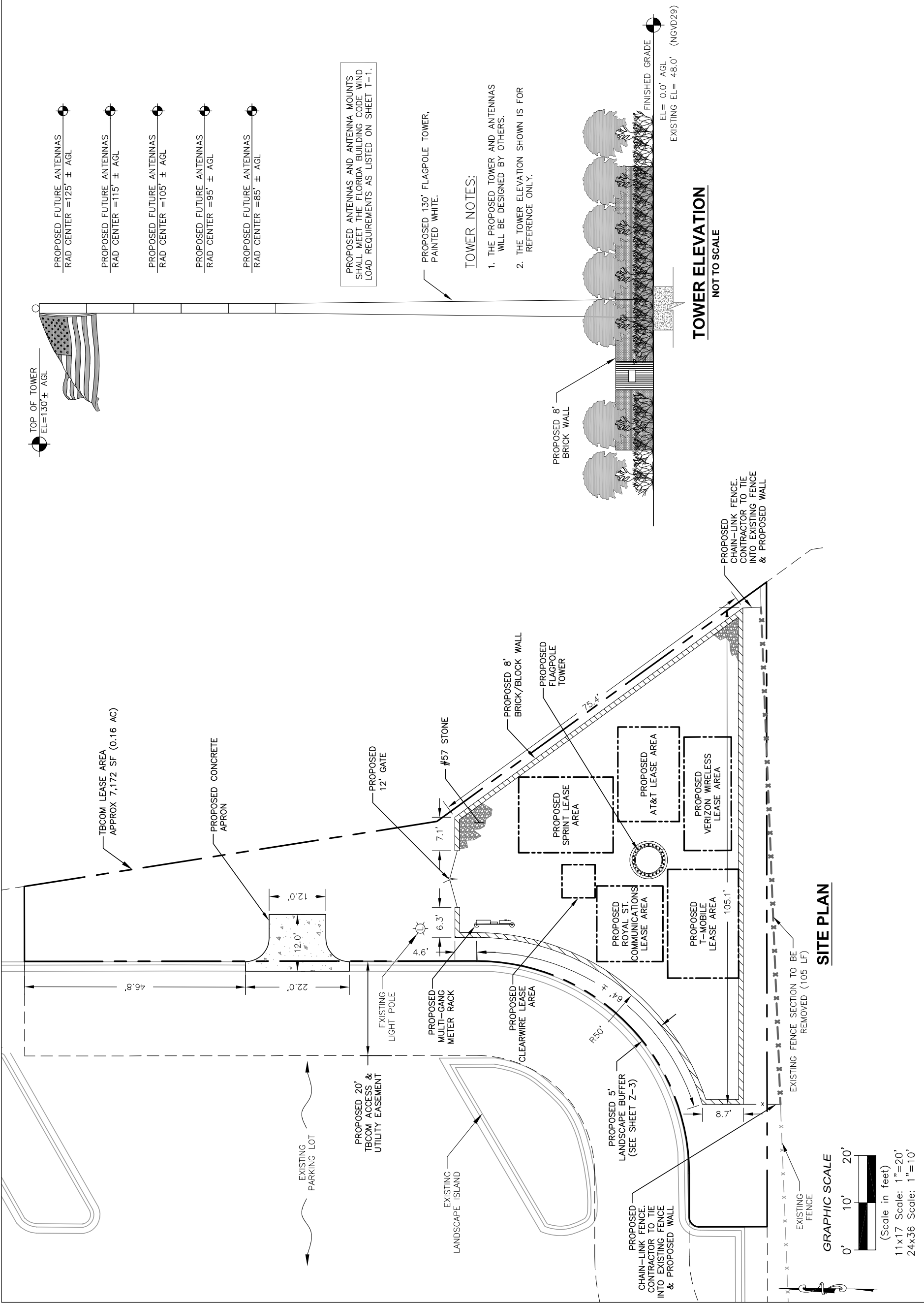
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DATE:	10/24/08
TITLE:	

SITE PLAN &	
TOWER ELEVATION	
SHEET NUMBER:	Z-2
JOB/FILE NUMBER:	067.019





foreSITE
group

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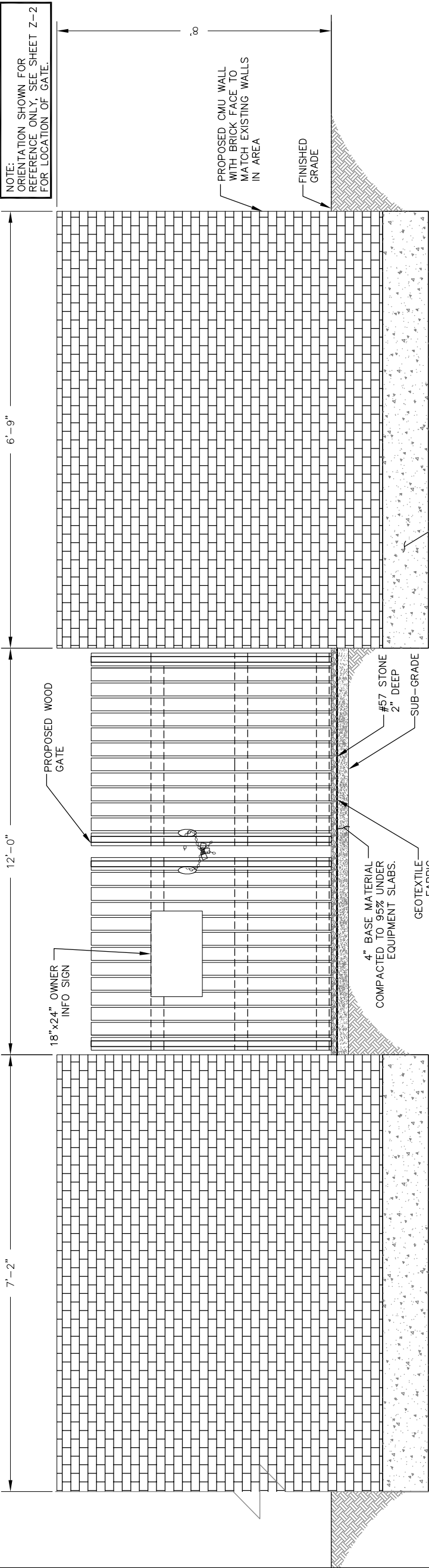
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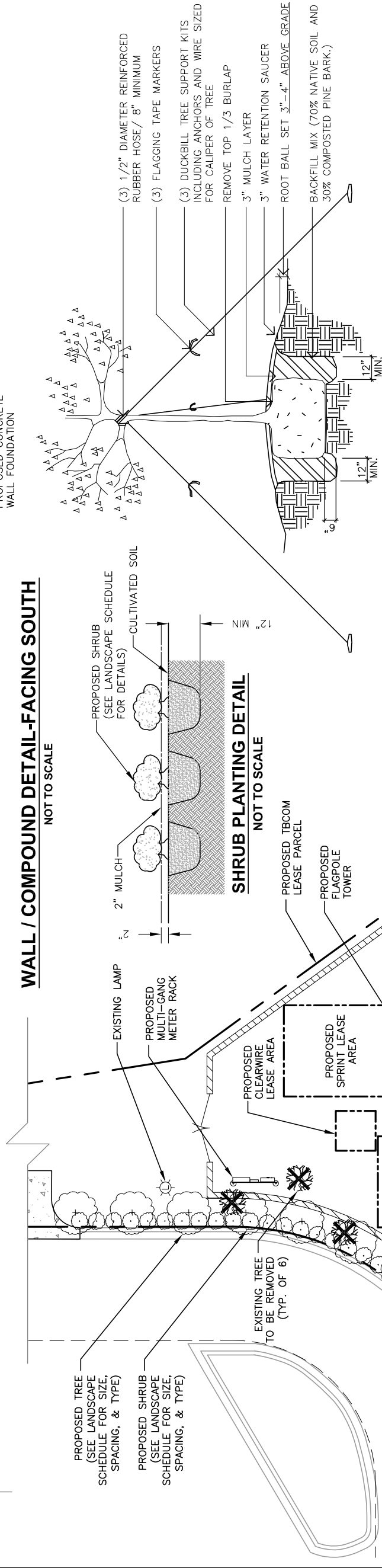
LANDSCAPE PLAN
& CONSTRUCTION
DETAILS

SHEET NUMBER: Z-3
JOB/FILE NUMBER: 067.019



WALL / COMPOUND DETAIL-FACING SOUTH

NOT TO SCALE



LANDSCAPE SCHEDULE					COMMENTS	
SPECIES	HEIGHT (MIN.)	QUANTITY	SIZE	SPACING (MAX.)		
TREES						
LIVE OAK (QUERCUS VIRGINIANA)	8'	21	2 1/2" DBH	10' O.C.		
SHRUBS						
VIBURNUM (VIBURNUM ODORATISSIMUM)	24" TALL (MIN) AT PLANTING	73	-	3' O.C.	XERISCAPE TOLERANT, CAPABLE OF REACHING 36" WITHIN 12 MONTHS	



(Scale in feet)
11x17 Scale: 1"=20'
24x36 Scale: 1"=10'

LANDSCAPE PLAN